as meaning that an agency may not have administrative practices or policies to refrain from taking certain action as well as practices or policies contemplating positive acts of some kind.[116] But before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency.[117] Suppose, for example, that shoe factories in a particular area were not investigated by Wage and Hour Division inspectors operating in the area. This fact would not establish the existence of a practice or policy of the Administrator to treat the employees of such establishments, for enforcement purposes, as not subject to the provisions of the Fair Labor Standards Act, in the absence of proof of some affirmative action by the Administrator adopting such a practice or policy. A failure to inspect might be due to any one of a number of different reasons. It might, for instance, be due entirely to the fact that the inspectors' time was fully occupied in inspections of other industries in the area.

(i) It was pointed out above that sections 9 and 10 do not offer a defense to the employer who relies upon a regulation, order, ruling, approval or interpretation which at the time of his reliance has been rescinded, modified or determined by judicial authority to be invalid. The same is true regarding administrative practices and enforcement policies.[118] However, a plea of a ''good faith'' defense is not defeated by the fact that after the employer's reliance, the practice or policy is rescinded, modified, or declared invalid.

§ 790.19 "Agency of the United States."

(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of an ''agency of the United States.'' Insofar as acts or omissions occurring on or after May 14, 1947 are concerned, it must be that of the ''agency of the United States specified in'' section 10(b), which, in the case of the Fair Labor Standards Act, is ''the Administrator of the Wage and House Division of the Department of Labor.'' However, with respect to acts or omissions occurring prior to May 14, 1947, section 9 of the Act permits the employer to show that he relied upon and conformed with a regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy of ''any agency of the United States.''[119]

(b) The Portal Act contains no comprehensive definition of ''agency'' as used in sections 9 and 10, but an indication of the meaning intended by Congress may be found in section 10. In that section, where the ''agency'' whose regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy may be relied on is confined to ''the agency of the United States'' specified in the section, the Act expressly limits the meaning of the term to the official or officials actually vested with final authority under the statutes involved.[120]

Commission v. *Bunte Brothers, Inc.*, 312 U.S. 349, 351 (1941). See also President's message of May 14, 1947, 93 Cong. Rec. 5281.

[116] See, for example, *Mintz* v. *Baldwin*, 289 U.S. 346, 349 (1933), where the Department of Agriculture announced ''its policy for the present is to leave the control (of Bang's disease) with the various States.'' See also in this connection the statement of June 23, 1947, by the Senate Committee on the Judiciary regarding the President's message of May 14, 1947, on the Portal-to-Portal Act, 93 Cong. Rec. 5281.

[117] *Union Stockyards & Transit Co.* v. *United States*, supra. It may be noted in this connection that examples given by the sponsors of the legislation, in discussing the terms ''administrative practice or enforcement policy,'' involved situations in which affirmative action had been taken by the agency. Conference Report, p. 16; 93 Cong. Rec. 2185, 2198, 4389–4391.

[118] See § 790.17 (h) and (i), and footnotes 111 and 112.

[119] The differences in the provisions of the two sections are explained and illustrated in § 790.13.

[120] In regard to the Walsh-Healey Act, ''agency'' is defined in section 10 of the Portal-to-Portal Act as including, in addition to the Secretary of Labor, ''any Federal officer utilized by him in the administration of such Act.'' The legislative history of the Portal-

Similarly, the definitions of ''agency'' in other Federal statutes[121] indicate that the term has customarily been restricted in its usage by Congress to the persons vested under the statutes with the real power to act for the Government—those who actually have the power to act as (rather than merely for) the highest administrative authority of the Government establishment.[122] furthermore, it appears from the statement of the managers on the part of the House accompanying the Conference Committee Report, that the term ''agency'' as appearing in the Portal Act was employed in this sense. As there stated (p. 16), the regulations, orders, ruling, approvals, interpretations, administrative practices and enforcement policies relied upon and conformed with ''must be those of an 'agency' and not of an individual officer or employee of the agency. Thus, if inspector A tells the employer that the agency interpretation is that the employer is not subject to the (Fair Labor Standards) Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretations, unless it is in fact the interpretation of the agency.''[123] Similarly, the Chairman of the Senate Judiciary Committee, in explaining the conference agreement to the Senate, made the following statement concerning the ''good faith'' defense. ''It will be noted that the relief from liability must be based on a ruling of a Federal agency, and not a minor official thereof. I, therefore, feel that the legitimate interest of labor will be adequately protected under such a provision, since the agency will exercise due care in the issuance of any such ruling.''[124]

(c) Accordingly, the defense provided by sections 9 and 10 of the Portal Act is restricted to those situations where the employer can show that the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy with which he conformed and on which he relied in good faith was actually that of the authority vested with power to issue or adopt regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of a final nature as the official act or policy of the agency.[125] Statements made by other officials or employees are not regulations, orders, rulings, approvals, interpretations, administrative practices or enforcement policies of the agency within the meaning of sections 9 and 10.

Restrictions and Limitations on Employee Suits

§ 790.20 Right of employees to sue; restrictions on representative actions.

Section 16(b) of the Fair Labor Standards Act, as amended by section 5 of the Portal Act, no longer permits an employee or employees to designate an agent or representative (other than a member of the affected group) to maintain, an action for and in behalf of all employees similarly situated. Collective actions brought by an employee or employees (a real party in interest) for and in behalf of himself or themselves and other employees similarly situated may still be brought in accordance with the provisions of section 16(b). With respect to these actions, the amendment provides that no employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and

to-Portal Act (93 Cong. Rec. 2239–2240) reveals that this clause was added because of the language in the Walsh-Healey Act authorizing the Secretary of Labor to administer the Act ''and to utilize such Federal officers and employees * * * as he may find necessary in the administration.''

[121] FEDERAL REGISTER Act, 44 U.S.C. 304; Federal Reports Act, 5 U.S.C. 139; Administrative Procedure Act, 5 U.S.C. 1001.

[122] See *Cudahy Packing Co.* v. *Holland,* 315 U.S. 357 (1942); *United States* v. *Watashe,* 102 F. (2d) 428 (C.A. 10, 1939); 39 Opinions Attorney General 15 (1925). Cf. *Keyser* v. *Hitz,* 133 U.S. 138 (1890); 39 Opinions Attorney General 541 (1933); 13 George Washington Law Review 144 (1945).

[123] See also statement by Representative Gwynne, 93 Cong. Rec. 1563; and statement by Senator Wiley explaining the conference agreement to the Senate, 93 Cong. Rec. 4270.

[124] Statement of Senator Wiley, 93 Cong. Rec. 4270.

[125] Statement by Representative Gwynne, 93 Cong. Rec. 1563; statements by Representative Walter, 93 Cong. Rec. 1496–1497, 4389; statement by Representative Robsion, 93 Cong. Rec. 1500; statement by Senator Thye, 93 Cong. Rec. 4452.